Norkin v. DLA Piper Rudnick Gray Cary L.L.P.		Doc. 25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DAVID NORKIN,

Plaintiff,		Case No. 05 CV 9137 (DC)

-against-

DLA PIPER RUDNICK GRAY CARY, LLP,

Defendant.

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PLAINTIFF'S REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR REMAND

This memorandum is submitted in reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Remand and in further support of that motion.

Argument

I.

ABSTENTION HEREIN IS MANDATORY
PURSUANT TO 28 U.S.C. §1334

This Action did not "arise in" plaintiff's bankruptcy proceeding:

The parties are in agreement that in determining whether mandatory abstention pursuant to 28 U.S.C. §1334(c)(2) applies, the Court must determine whether the instant proceeding is a "core" or a "non-core" action.

As we pointed out in plaintiff's Memorandum in support of the motion, this malpractice action does not fit within any of the

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categories expressly set forth in 28 U.S.C. §157(b) as examples of "core" proceedings.

The contrast between core and non-core proceedings was succinctly expressed in Von Richtoven v. Family M. Foundation Ltd., 2005 U.S. Dist. LEXIS 20010 (S.D.N.Y. 2005) at *9:

> In general, non-core proceedings "involve disputes over rights that...have little or no relation to the Bankruptcy Code, do not arise under federal bankruptcy law and would exist in absence of a bankruptcy case." In re Complete Mgmt., Inc., 2002 U.S. Dist. LEXIS 18344, No. 02 Civ. 1763, 2000 WL 31163878, at *2 (S.D.N.Y. Sep. 27, 2002) (citing Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld LLP, 201 B.R. 635, 639 (S.D.N.Y. 1996). By contrast, core proceedings "invoke a substantive right created by federal bankruptcy law and that would not exist outside of a bankruptcy case." In re FMI Forwarding Co., Inc., 2004 U.S. Dist. LEXIS 10941, No. 01 Civ. 9462, 2004 WL 1348956, at *4 (S.D.N.Y. Jun. 16, 2004) (internal citation and quotation omitted).

See, also, XL Exports Ltd. v. Lawler, 2002 U.S. App. LEXIS 21168, (6th Cir. 2002), (core proceedings "must involve a claim that is directly created by bankruptcy rule or that by nature could not exist outside the bankruptcy context") (citation omitted). And see Luan Investment S.E. v. Franklin 145 Corp., 304 F.3d 223, 229 (2nd Cir. 2002), quoting In re United States Lines, Inc.,197 F.3d 631 at 637:

> Proceedings can be core by virtue of their nature if either (1) type of proceeding is unique to or uniquely affected by the bankruptcy proceedings...or (2) the proceedings directly affecting core bankruptcy function.

It should be noted that both Complete Mgmt. Inc., supra and Wechsler, supra, cited in Von Richtoven like the case at bar, were malpractice claims in which the claims were held to be non-core.

Clearly, this malpractice action would exist independent of Mr. Norkin's bankruptcy proceeding and whether or not such a proceeding ever existed. There are no issues which the bankruptcy court is uniquely qualified to consider. The action arises under New York State common law and New York State rules and regulating the practice of law.

The defendant -- pointing out that the claims at bar arose subsequent to the filing of plaintiff's bankruptcy petition -- relies on language in Mt. McKinley Insurance Co. v. Corning, Inc., 399 F.2d 436 at 448 (2nd Cir. 2005), which provides that:

> [I]n determining whether a contract dispute such as the one in this lawsuit is core, we look to '(1) whether the contract is antecedent to the reorganization petition... (emphasis supplied).

The Second Circuit in both Mt. McKinley and in United States Lines Inc. v. American Steamship Owners Mutual Protection and Indemnity Association, 197 F.3d 631, 637 (2nd Cir. 1999), were specifically addressing contract actions, and specifically insurance contracts. No case cited by defendant has suggested that a tort action arising subsequent to bankruptcy and outside the bankruptcy context would for that reason be considered a core proceeding.

Unlike post-petition contracts which may involve court approval or otherwise affect the administration of the estate, a post-petition tort inflicted on an individual who happens to be in bankruptcy has no inherent connection to the bankruptcy proceeding.

Defendant suggests that the fact that a portion of the proceeds of any judgment in plaintiff's favor may be shared with the trustee makes this case a core proceeding. The Second Circuit has repeatedly held otherwise. As the Court noted in United States Lines, supra (197 F.3d at 637):

> Some arguments for deeming the contract claims core are unavailing, While "the debtors' rights under the insurance policies are property of a debtor's estate," St. Clare's Hosp. and Health Ctr. v. Insurance Co. of N. Am., In re St. Clare's Hosp. & Health Ctr.), 934 F.2d 15, 18 (2nd Cir. 1991), the contract claims are not rendered core simply because they involve property of the estate...A general rule that such proceedings are core because they involve property of the estate would "create [] an exception to Marathon that would swallow the rule." Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1102 (2d Cir. 1993).

See also, Lawrence Group v. Hartford Casualty Insurance Co., 285 B.R. 784, 788 (N.D.N.Y. 2002):

> As plaintiffs argue, 'any contract action that the debtor would pursue against a defendant presumably would be expected to inure to the benefit of the debtor estate and thus concerns its administration.' In re Orion, 4 F.3d at 1102 (internal quotations and alterations omitted). Finding any such contract action to sufficiently relate to the administration of the bankruptcy estate to render the action

> core "would swallow the rule" in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 L.Ed. 2d 598, 102 S.Ct. 2858 (1982), that "a pre-petition contract action...may not be finally adjudicated by a non-ARticle III Judge." In re Orion, 4 F.3d at 1102. "Where insurance proceeds would only augment the assets of the estate for general distribution," the effect on the administration of the estate [is] insufficient to render the proceedings core." In re U.S. Lines, Inc., 197 F.3d at 638.

At bar, apart from the fact that the Trustee may share in the proceeds of any recovery, the dispute does not involve Mr. Norkin's bankruptcy's proceeding in any way. It is a garden variety malpractice claim against an attorney who had no role whatsoever in Mr. Norkin's bankruptcy. Neither the Trustee, nor the debtor, nor any creditor seeks to have this case adjudicated in the bankruptcy court. Only the defendant -- a non-participant in the bankruptcy proceedings -- seeks intervention by the bankruptcy court.

Plaintiff's malpractice claim did not
"arise in" the Britestarr bankruptcy proceeding:

Defendant claims that this malpractice action by David Norkin "arose in" the bankruptcy case of Britestarr. However, it is undisputed that (1) the claims in this case arose prior to Britestarr's filing for bankruptcy; (2) the claims (as framed by the Complaint) arose out of defendant's personal advice to Norkin, and not its advice to Britestarr; (3) no part of a recovery in this case could possibly benefit Britestarr or its creditors; (4) Britestarr is not a party to the case; (5) combining this case with the Britestarr bankruptcy would not only complicate that proceeding, but cause undue cost and delay to the creditors and the trustee.

In support of its position, defendant cites Longacre Master Fund, Ltd. v. Telecheck Services, Inc., 317 B.R. 472, 476 (Bankr. S.D.N.Y. 2004) ("Casual Male"). That case involved a dispute over the sale of claims against a bankrupt debtor. The plaintiff filed a Notice of Intent in the bankruptcy court to purchase certain pre-petition claims against the debtor. The defendant filed a response to the effect that it had not agreed to sell those claims. The plaintiff brought a state court action to resolve the conflicting positions of the parties, which had first been raised in the bankruptcy proceeding. The bankruptcy court held that the dispute arose in the bankruptcy proceeding. The case has no bearing on the case at bar, where the dispute has never been raised in the Britestarr bankruptcy proceeding and is irrelevant thereto.

Incidentally, and of significance, the court in Longacre, despite holding that the dispute arose in the bankruptcy proceeding, nonetheless exercised its discretion to remand the matter to state court where, like this case, it belonged.

The defendant also cites Grausz v. Englander, 321 F.3d 467 (4th Cir. 2003). This Fourth Circuit case is also inapposite at bar. In Grausz, the plaintiff was the bankruptcy debtor, and the allegation concerned malpractice during the course of bankruptcy proceedings against the attorney who represented the debtor in those proceedings. Moreover, the bankruptcy court had approved the defendant law firm's fees in the bankruptcy action, and the Circuit Court held that that approval constituted res judicata with respect to the debtor's malpractice claim. In short, the claim was inextricably intertwined with the bankruptcy case.

Finally, defendant cites Bergstrom v. Delcon Shield Claimants Trust (In re: A.H. Robins Co.), 86 F.3d 364 (4th Cir.); cert. denied, 519 U.S. 553 (1996), another Fourth Circuit case. In A.H. Robins, the issue was the distribution of legal fees to plaintiff's attorneys from a trust created in a bankruptcy proceeding involving the manufacturer of the Delcon shield. Since the settlement of the cases, the creation of the trust, and a limitation on the amount of fees to be paid were all created within the bankruptcy court, the court held that the issue as to fees arose in the bankruptcy proceeding. Nothing about the facts of this case is even remotely related to the facts in A.H. Robins.

II.

IN ANY EVENT, THE COURT SHOULD EXERCISE ITS DISCRETION TO REMAND PURSUANT TO 28 U.S.C. §1452(b) and §1334(c)(1)

Even if abstention were not mandatory in this case (which it is), the Court should exercise its discretion to abstain pursuant to 28 U.S.C. §1452(b).

The defendant, citing In re Pan American Corp., 950 F.2d 839, 846 (2nd Cir. 1991) contends that discretion on abstention is reserved for "extraordinary and narrow exceptions." (Defendant's Memorandum, p. 10). Pan American, however, is inapposite at bar. First, Pan Am involves personal injury cases against the debtor. The Court cited compelling legislative history which indicated that in enacting 28 U.S.C. §157(b)(5), pertaining to personal injury cases against the debtor, Congress indicated that courts should "not be too quick" to abstain. Indeed, §157(b)(5) contains mandatory language that requires that personal injury toward and wrongful death claims against the bankrupt be tried in the district court in which the bankruptcy case is pending. (Despite the mandatory language, the courts have held that on an appropriate showing, the district court may abstain from hearing a personal injury case).

Second, in Pan Am, the Court of Appeals reversed the District Court's decision to abstain with respect to those claims covered by the Warsaw Convention, and thus federal law. (The Court let stand a decision to abstain in a case which was not covered by the Warsaw Convention). Thus, even in Pan Am, the Court let stand a district court decision to abstain upon deciding state law claims.

Defendant also cites this Court's decision in New York City Employees' Retirement System v. Ebbers (In re: Worldcom, Inc Secs. Litigation, 293 B.R. 308, 334 (S.D.N.Y. 2003). In Worldcom, numerous individual plaintiffs had convinced state court actions alleging violations of the Securities Act of 1933. Citing provisions of that act which, in and of themselves, would not permit removal. In addition to the individual actions, there have been a number of class actions commenced against the same defendants. This court denied plaintiff's motion for discretionary abstention primarily on two grounds, neither of which is present here: First, the multiplicity of actions arising out of the same or similar fact patterns weighed in favor of a consolidated handling of the cases; remand of multiple cases to various state court venue would materially increase the cost and slow down the pace of the litigation. Second, the cases involved the Federal Securities Law, and not primarily, state law.

This is a single action involving state law claims in which neither the debtor nor the trustee nor any creditor of the debtor seeks to have an adjudication in the bankruptcy court.

To the extent that this Court noted in Worldcom that there is a presumption against abstention, we note the following language in the more recent case, Mt. McKinley, supra (399 F.3d at 444) in determining the appealability of a decision denying abstention:

> Because the concerns of abstention -- comity and federalism -- are at least as strong when the district court refuses to abstain as when it abstains, *see id.*, we see no material distinction between right to stay in federal court and a right to return to state court.

Conclusion

The Court should remand this action to the Supreme Court, New York County where it was commenced.

Dated: New York, New York
February 3, 2006

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